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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

JUAN LUNA,

Plaintiff and Appellant,

v.

ALMA ALVARADO,

Defendant and Respondent.

F076437

(Super. Ct. No. 16CECG02772)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Kristi Culver Kapetan, Judge.

Juan Luna, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

-ooOoo-

Appellant, Juan Luna, appeals the dismissal of his civil complaint against respondent, Alma Alvarado. Appellant alleged respondent abducted his son, K.A., in violation of Civil Code section 49, subdivision (a).¹ Though appellant obtained entry of respondent's default, the trial court refused to grant default judgment and ultimately

* Before Poochigian, Acting P.J., Detjen, J. and DeSantos, J.

¹ All further statutory references are to the Civil Code unless otherwise indicated.

ordered the case dismissed because Luna had not alleged that he was entitled to legal custody of K.A. Upon review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

Appellant filed a complaint on August 25, 2016.³ Appellant served respondent by publication and submitted proof of publication to the trial court on February 15, 2017.⁴ On May 1 and 2, appellant filed an amended complaint naming additional defendants⁵ along with a request for default judgment.⁶ Appellant alleged in the amended complaint that Alvarado abducted K.A. at birth on January 16, 2008, denying appellant the ability to have a relationship with K.A. He brought a claim under section 49, subsection (a) alleging that Alvarado abducted K.A. and the other defendants conspired with and aided and abetted Alvarado in the abduction.

On June 13, the trial court denied the request for default judgment without prejudice. The court held the allegations of the amended complaint failed to state a cause

² The record on appeal is incomplete. An appellant has the burden of providing an adequate record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) The failure to provide an adequate record on an issue requires that the issue be resolved against appellant. (*Id.* at pp. 1295-1296; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) Appellant provided a copy of the trial court docket. We will note when the docket indicates that relevant documents were filed or orders were issued by the trial court but were not provided in the appellate record.

³ Appellant did not provide a copy of the original complaint in the appellate record. Appellant provided copies of the first and second amended complaints; however, without the benefit of a copy of the original complaint, we do not know its contents or how the allegations were changed in the amended complaints.

⁴ Appellant did not provide records relating to service.

Subsequent undesignated references to dates are to dates in 2017.

⁵ Both appellant's first and second amended complaints name Dough Harrison, Jeri Nowak and Vivian Scholl as defendants. These defendants, however, were never served, so they are not parties to the appeal.

⁶ Appellant provided a copy of the amended complaint in the appellate record, but failed to provide copies of the application for default judgment and related documents.

of action and default judgment would therefore be erroneous. In order to claim abduction, the court held appellant must show he had lawful custody of K.A. However, appellant admitted he had never seen K.A., let alone had legal custody. The court set an order to show cause hearing why the action should not be dismissed and advised appellant “[i]f partial custody or visitation is [appellant’s] goal, his remedy is to be found in the family law division of this court, not in the civil division.”

On June 29, the court held the show cause hearing and dismissed the amended complaint.⁷

Appellant filed a motion to set aside the dismissal on July 7. Appellant explained he thought the court was only dismissing his original complaint, not the first amended complaint he filed with the request for default, and therefore his failure to respond or attend the hearing was based on mistake or inadvertence. Appellant also filed a proposed second amended complaint in which he alleged a cause of action for loss of consortium with his son, rather than abduction under section 49, subdivision (a).

The trial court denied the motion to set aside the dismissal order on August 16. In the order denying the motion, the court explained that appellant requested default judgment, but stated in his declaration supporting default judgment he had never seen K.A. Without alleging custody, the court found the first amended complaint did not state a cause of action and dismissed the complaint with prejudice.

The court noted appellant requested the court set aside the dismissal based on excusable neglect in failing to oppose or appear at the show cause hearing, and in light of the allegations of the proposed second amended complaint alleging intentional interference with parental consortium. The court held it would be ineffectual to grant relief because the proposed second amended complaint failed to state facts sufficient to

⁷ Appellant did not provide the reporter’s transcript or written order from the hearing.

state a cause of action. The court held that a cause of action premised on intentional interference with parental consortium, like abduction, requires legal custody of the child, and appellant could not establish custody based on his admission that he had never seen the child. The court again advised appellant that he may attempt to seek relief in the family court if his goal was partial custody or visitation rights.

On October 10, appellant filed his notice of appeal of the order dismissing the action.

DISCUSSION

I. Relevant Law

A. Abduction of a Child; Loss of Consortium

“It has long been established that the unlawful taking or withholding of a minor child from the custody of the parent or guardian entitled to such custody constitutes an actionable tort.” (*Surina v. Lucey* (1985) 168 Cal.App.3d 539, 542 (*Surina*).) However, the critical consideration is whether the parent or guardian has legal custody of the child, as “[o]ne who is not entitled to custody has no privilege to interfere with the legal custody of the child.” (*Ibid.*)

Section 49 provides in pertinent part: “The rights of personal relations forbid: (a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody[.]” (§ 49, subd. (a).) “[S]ection 49 was crafted by the Legislature to protect the parents’ right to custody and control of their minor child.” (*Surina, supra*, 168 Cal.App.3d at 542, italics omitted.) “Under Civil Code section 49 [a] parent who abducts or entices [a] child away may be liable in tort. The statute thus serves to deter child-stealing by feuding parents and similar antisocial conduct.” (*Id.* at p. 543.) “Put simply, a third party may not interfere with the parents’ right to custody, even if motivated by kindness or affection toward the child.” (*Ibid.*) Accordingly, a prerequisite to stating a cause of action under section 49, subsection (a), is establishing custody of the child.

In *Baxter v. Superior Court* (1977) 19 Cal.3d 461, 464, the California Supreme Court refused to recognize a parent's cause of action for loss of a child's consortium. However, the decision did not bar claims based on intentional interference with parental consortium. (*Id.* at p. 466, fn. 3; *Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 451, fn. 3 (*Borer*).) The court noted intentional interference with parental consortium is "a relatively unusual tort" and its continued application "may serve to deter child stealing and similar antisocial conduct." (*Borer, supra*, at p. 451, fn. 3.) "The Restatement Second of Torts also makes it clear that a parent who has the right to the custody, control, and services of a minor child may maintain an action for damages against *anyone* who unlawfully takes or withholds such child. (Rest.2d Torts, § 700.)" (*Surina, supra*, 168 Cal.App.3d at p. 544.) However, the right of action of intentional interference with parental consortium is based "on the parent's right to the care, custody, and companionship of the child." (*Ibid.*)

B. Paternity and Custody

The determination of custody of minor children is governed by the Uniform Parentage Act (UPA). The UPA (Fam. Code, § 7600 et seq.) is "the statutory framework governing judicial determinations of 'the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations.' " (*Bianka M. v. Superior Court* (2018) 5 Cal.5th 1004, 1012; Fam. Code, § 7601, subd. (b).)

"The UPA defines the ' "[p]arent and child relationship" ' as 'the legal relationship existing between a child and the child's natural or adoptive parents.... The term includes the mother and child relationship and the father and child relationship.' " (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 116 (*Elisa B.*); Fam. Code, § 7601.) The UPA provides that the parentage of a child does not depend upon " "the marital status of the parents" ' [citation], stating: "The parent and child relationship extends

equally to every child and to every parent, regardless of the marital status of the parents.’ ” (*Elisa B.*, *supra*, 37 Cal.4th at p. 116; Fam. Code, § 7602.)

The UPA contains provisions defining who is a “parent.” Family Code section 7611 provides several circumstances in which “[a] person is presumed to be the natural parent of a child,” including: if the presumed parent is married to the child’s mother and is not impotent or sterile (§ 7540); if he signs a voluntary declaration of paternity stating he is the “biological father of the child” (§ 7574, subd. (b)(6)); and if he “receives the child into his ... home and openly holds out the child as his ... natural child” (§ 7611, subd. (d)). Even if a presumption of fatherhood does not apply, a purported father can petition to establish parental relationship and seek genetic testing to establish parentage. (Fam. Code, §§ 7551, 7554-7555.) Family Code section 7636 provides, “The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes except for actions brought pursuant to Section 270 of the Penal Code.” “ ‘Parent and child relationship’ as used in this [statute] means the *legal* relationship existing between a child and the child’s natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations.” (Fam. Code, § 7601, subd. (b), *italics added*.)

C. Standard of Review

In this appeal, appellant challenges the trial court’s dismissal of his case with prejudice. After denying his application for default judgment, the trial court, using its inherent authority, set an order to show cause hearing and dismissed the amended complaint with prejudice. The court determined that appellant did not allege facts nor could he amend the complaint to allege facts to support a valid claim due to his admission he had never had custody of or even seen K.A.

Although not authorized by statute, the court possessed authority to sua sponte set an order to show cause hearing regarding dismissal of the action based on its inherent ability to control the disposition of causes on its docket. “ ‘It is well established, in

California and elsewhere, that a court has both the inherent authority and responsibility to fairly and efficiently administer all of the judicial proceedings that are pending before it, and that one important element of a court's inherent judicial authority in this regard is "the power ... to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." ' ' ' (Briggs v. Brown (2017) 3 Cal.5th 808, 852; see, e.g., Hays v. Superior Court (1940) 16 Cal.2d 260, 264 ["There is nothing novel in the concept that a trial court has the power to exercise a reasonable control over all proceedings connected with the litigation before it. Such power necessarily exists as one of the inherent powers of the court and such power should be exercised by the courts in order to insure the orderly administration of justice."].)

Here, the court determined at the default judgment hearing the allegations in the amended complaint and declarations submitted in support of default judgment failed to state a valid cause of action against respondent. However, as respondent had defaulted, she could not move to dismiss the action without first setting aside the default and no statutory procedure would have otherwise automatically functioned to dismiss the action. As appellant could not state a cause of action based on the pleadings and declarations provided, the court used its inherent authority to set a dismissal hearing. In so doing, the court provided appellant an opportunity to amend the complaint or provide additional information to show he could state a viable cause of action. However, appellant failed to take any action in response to the show cause hearing, such as appearing, filing a response, or requesting an extension of time. Accordingly, the court dismissed the action.

"In the absence of express statutory authority, a trial court may, under certain circumstances, invoke its limited, inherent discretionary power to dismiss claims with prejudice." (Lyons v. Wickhorst (1986) 42 Cal.3d 911, 915 (Lyons); see Code Civ. Proc.,

§ 581, subd. (m) [“The provisions of [§ 581] shall not be deemed to be an exclusive enumeration of the court’s power to dismiss an action”].) The power of the court to dismiss actions with prejudice “has in the past been confined to two types of situations: (1) the plaintiff has failed to prosecute diligently (*Romero v. Snyder* (1914) 167 Cal. 216); or (2) the complaint has been shown to be ‘fictitious or sham’ such that the plaintiff has no valid cause of action (*Cunha v. Anglo California Nat. Bank* (1939) 34 Cal.App.2d 383, 388).” (*Lyons, supra*, 42 Cal.3d at p. 915, fn. omitted.) The California Supreme Court has instructed that an order dismissing an action is presumed correct and may not be reversed on appeal unless the appellant meets his or her burden of showing that the trial court abused its discretion. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) We will review whether the court abused its discretion in determining that appellant failed to diligently prosecute the action.

D. Analysis

There is no doubt from the record that appellant was provided notice of the dismissal hearing. The court, in a written order on June 13, denied the request for default judgment and set a dismissal hearing on June 29. The court clerk mailed a copy of the order to appellant. Appellant did not appear at the hearing, and after the court dismissed the action, he filed a motion to set aside the dismissal. Appellant acknowledges receiving the court order setting the dismissal hearing but contends that he mistakenly believed the dismissal was to the original complaint and not the amended complaint and decided not to attend. Appellant presented no argument in his motion to set aside the dismissal regarding how, if given the opportunity, he could state a viable cause of action. Rather, without explanation, he provided the trial court a proposed second amended complaint with claims for intentional interference with parental consortium with K.A. rather than claims of abduction under section 49. The proposed second amended complaint did not allege appellant had custody of K.A.

The trial court held that granting the motion to set aside dismissal based on appellant's mistake, inadvertence, surprise, or neglect, or, alternatively, based on allegations in the proposed second amended complaint would be ineffectual because appellant failed to state facts sufficient to state a cause of action. Upon review, we find the trial court did not abuse its discretion in dismissing the action for failure to prosecute. The court properly determined that the allegations alleged by appellant, whether construed as claims of abduction under section 49, or common law intentional interference with parental consortium, require a plaintiff to possess legal custody of the child. The statutory language of section 49, subsection (a), states that the child must be abducted from "a parent, or from a guardian entitled to its custody." Cases interpreting an action for intentional interference with parental consortium determined it is also based "on the parent's right to the care, custody, and companionship of the child."⁸ (*Surina*, *supra*, 168 Cal.App.3d at p. 544.)

Appellant presented no allegations that create a presumption under the UPA that he was the presumed parent of K.A. He did not allege he was married to K.A.'s mother, nor that he signed a voluntary declaration of paternity, and, based on his statements, he had never seen K.A. nor received K.A. into his home. (See Fam. Code, § 7611.) Appellant did not allege that he had petitioned to establish a parental relationship with K.A. (Fam. Code, §§ 7551, 7554-7555.) "A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not

⁸ In *Surina*, the only modern case to address intentional interference with parental consortium, the court held the cause of action was based on the same operative facts and was simply a statement of the injury that arose from the statutory abduction violation under section 49. (*Surina*, *supra*, 168 Cal.App.3d at pp. 544-545 ["As we see it, plaintiffs' allegations of intentional or negligent infliction of emotional distress, while characterized as separate causes of action, are simply statements of a form of injury which flow from the basic delict which is a violation of Civil Code section 49."].) Regardless whether intentional interference with parental consortium is a separate cause of action, the claim requires a plaintiff to have custody of the child.

achieved presumed father status, is an ‘alleged’ father” and on that basis alone is not entitled to custody of the child. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.)

Despite multiple opportunities to assert allegations that he had custody of K.A., appellant failed to do so. The court did not abuse its discretion in determining appellant failed to prosecute the action by not appearing at the dismissal hearing. Nor did the court abuse its discretion in denying the motion to set aside the dismissal as appellant failed to present allegations he had a right to custody of K.A.

DISPOSITION

The order is affirmed. Each party to bear his or her own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)